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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LUCIOUS ABRAMS, JR., REV. G.L. AVERY, WILLIAM GARY CHAMBERS, SR., and KAREN WATSON,

Appellants,

v.

DAVIDA JOHNSON, *et al.*,

Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia (Three-Judge Court)

REPLY BRIEF OF APPELLANTS

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25 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument --

I. The Decision Below Is not Shielded by the Clearly Erroneous Rule 1

II. Appellees' Description of the Eleventh District and the Redistricting Process Is a Gross Distortion 2

A. The Redistricting Process 2

B. The Eleventh District 6

III. Appellees (and the Court Below) Improperly Seek to Review the Attorney General's Section 5 Determinations 12

IV. Appellees Lack Standing 15

Conclusion 20

TABLE OF AUTHORITIES

Page

Cases:

Batson v. Kentucky, 476 U.S. 79 (1986) 19n

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 1

Brown v. Board of Education, 347 U.S. 483 (1954) 19n

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 14, 18

City of Rome v. United States, 446 U.S. 156 (1980) 15

Davis v. Passman, 422 U.S. 228 (1979) 16

Evans v. Abney, 396 U.S. 435 (1970) 19n

Gayle v. Browder, 352 U.S. 903 (1956) 19n

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 19

Hernandez v. New York, 500 U.S. 352 (1991) 19n

Heckler v. Mathews, 465 U.S. 728 (1984) 19

Holmes v. Atlanta, 350 U.S. 879 (1955) 19n

Johnson v. De Grandy, 114 S. Ct. 2647 (1994) 5

Loving v. Virginia, 388 U.S. 1 (1967) 18

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) 15-16, 17

Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) 19n

McCain v. Lybrand, 465 U.S. 236 (1984) 15

Morris v. Gressette, 432 U.S. 491 (1977) 13, 14

Northeastern Florida Contractors v. Jacksonville, 113 S. Ct. 2297 (1993) 16, 19

Palmer v. Thompson, 403 U.S. 217 (1971) 19n

Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992) 14

Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) 19

Rogers v. Lodge, 458 U.S. 613 (1982) 1

Shaw v. Reno, 113 S. Ct. 2816 (1993) 15, 16, 17, 18, 19

Smith v. Allwright, 321 U.S. 649 (1944) 19

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 15

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Thornburg v. Gingles, 478 U.S. 30 (1986) 1, 14, 20

Wygant v. Jackson Board of Education, 476 U.S. 276 (1986) 19

Constitutional Provisions:

Article III, Section 1 of the Constitution of the United States 16

Statutes and Rules:

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 14

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c 15

Rule 52(a), Fed. R. Civ. P. 1

Other Authorities:

Congressional Quarterly's Politics in America 1994: The 103rd Congress (P. Duncan ed. 1994) 8

Laughlin McDonald, "The Quiet Revolution in Minority Voting Rights," 42 Vand. L. Rev. 1249 (1989) 18n

I. The Decision Below Is not Shielded by the Clearly Erroneous Rule

Rule 52(a), FED. R. CIV. P., does not restrict the power of an appellate court to correct errors of law, "including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), *quoting Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). The district court in this case made numerous errors of law which infected the fact finding process, *e.g.*, that a bizarre shape was not a predicate for strict scrutiny, J.S. App. 30, 36, that the Section 5 determinations of the Attorney General were subject to plenary review and that the Attorney General's determinations were wrong, J.S. App. 62-63, that taking into account "the racial community of interest shared by black citizens . . . is barred from constitutional recognition," J.S. App. 45, that the 1992 plan was not narrowly tailored because the state had no compelling interest in complying with the Section 5 objections, J.S. App. 62, and that consideration of race as a substantial factor by the legislature rendered the plan constitutionally suspect and ultimately unconstitutional. Because of its numerous errors of law, review of virtually all of the fact finding by the district court is uninhibited by Rule 52(a), including its ultimate legal conclusion of a constitutional violation.

In addition, Rule 52(a) is no limitation on review where a district court, as here, failed to consider a substantial amount of the relevant evidence. Detailed fact finding is required in voting cases because the "determination [of a violation] is peculiarly dependent upon the facts of each case." *Rogers v. Lodge*, 458 U.S. 613, 621 (1982). *Accord Thornburg v. Gingles*, 478 U.S. at 79. Because the district court failed to apply the proper legal standard of considering all the relevant facts and evidence,

its findings are not entitled to deference under Rule 52(a). Appellants have attempted to supply the requisite "searching" appraisal of the facts in this reply brief. *Id.*

II. Appellees' Description of the Eleventh District and the Redistricting Process Is a Gross Distortion

Appellees' description of the Eleventh District and the role of race in the redistricting process is a gross distortion built upon rhetorical excesses and disregard for the record.

A. The Redistricting Process. In their brief appellees insist repeatedly that the configuration of the Eleventh District is *solely* the product of race. *See, e.g.*, Brief of Appellees at 2, 3 (race was considered "regardless of *literally anything*" other than one person, one vote), 7, 13 (the "*sole* reason" for the shape of the district was race), 22 (non-racial factors in redistricting "were entitled to *no consideration whatsoever*"), 37 (the configuration of the district is "'unexplainable' on grounds *other than race* . . . . It would be . . . disingenuous to deny that this dramatic irregularity is the product of *anything but race*"), 41 (emphasis added).

Appellees are driven to these descriptive excesses, as noted *infra*, not simply by advocacy, but because they acknowledge that "race awareness will often impact district lines in light of the Voting Rights Act," and that "the legislature 'may intentionally consider race in redistricting.'" Brief of Appellees at 35-36. Appellees cite with apparent approval the district court's holding that a legislature may alter district lines "'in keeping with that consideration [of race]--without incurring [strict scrutiny].'" *Id.* at 36. Further, because non-racial factors are always present, proof of the improper use of race in redistricting will be difficult to prove "[i]n the vast majority of cases." *Id.* Because appellees understand that race may properly be taken into account in

redistricting, they must adopt the rhetoric that race was the sole factor here.[1]

Neither the record nor the findings of the district court support appellees' unchecked hyperbole. Race was admittedly a factor in redistricting, but it was only one of many factors. The three-judge court acknowledged that the legislature "was concerned with passing redistricting legislation affecting all Georgians, and contended with numerous factors racial, political, economic, and personal." J.S. App. 26. The state's plans "reflected many influences." *Id.* Moreover, in areas where the district is irregular, the cause of the irregularity had nothing to do with race.

As a premier example of the district's alleged irregularity, appellees point to a "serpentine" appendage that "snakes along the Savannah River." Brief of Appellees at 3. However, appellees fail to note that the appendage exists because a white legislator wanted the district line drawn in Chatham County "by the narrowest means possible" to keep

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[1]As appellants have noted, Brief of Appellants at 25 n.5, App. 7, Judge Bowen, a member of the three-judge court, during a break in the trial of this case intentionally took race into account in drawing two majority-black districts for the Laurens County, Georgia Board of Commissioners. The plan was drawn to correct a one-person, one-vote violation and not a violation of the Voting Rights Act. Despite that, race was a "substantial" or "predominant" factor in the construction of the plan, and even though it was "bizarre" in that it was not contiguous, Judge Bowen did not regard the plan as constitutionally suspect nor did he subject it to strict scrutiny. He felt under "the obligation . . . to construct two majority-minority districts," and noted that the districts "are mixed in all respects of an urban and an agricultural interest" and appropriate to "the sensitivities and traditions of the people." *Id.*, App. 6-7. In other words, the plan was not drawn solely on the basis of race, it was designed to be inclusive, and it did not injure anyone. The Eleventh District would be constitutional under the standard applied by Judge Bowen in the Laurens County case, and there is no basis for treating it differently.

as much of the county in the First District as possible. Dixon, T. Vol. IV, 174. Similarly, the "thread through Henry County," Brief of Appellees at 3, was the result of political horse trading, Meggers, T. Vol. II, 206-09, and the state's non-racial decision to follow precinct lines, Meggers, T. Vol. I, 207-09.

Appellees make the startling -- and inaccurate -- claim that "without exception, every witness who testified" confirmed that the 1992 plan was "a deliberate effort to separate voters according to their race." Brief of Appellees at 10. According to Rep. Bob Hanner, however, one of the witnesses cited by appellees, the members of the legislature "tried our best" to follow the redistricting guidelines, none of which had anything to do with "separating" or segregating voters according to race. T. Vol. III, 260. The racial purpose of the redistricting process was not to achieve segregation but to avoid "diluting minority voting strength." T. Vol. III, 252. Considerations other than race influenced the drawing of district lines. T. Vol. III, 265. Rep. Hanner, a white legislator who was elected from a majority-black district, did not think he was harmed in any way by residing in a majority-minority district. T. Vol. III, 268. He did not think the Eleventh District was a district in which only a black could win. T. Vol. III, 263. Thus, while Rep. Hanner testified that race was taken into account in redistricting, it is incorrect to say that he believed the 1992 plan was nothing more than an effort to separate or segregate voters on the basis of race.

Appellees also completely ignore the testimony of Tyrone Brooks, a black member of the house. He denied that the 1992 plan was an effort to segregate voters by race. Rep. Brooks felt "just the opposite. I feel that we are bringing more diversity and giving all Americans . . . an opportunity to realize representation in the American body of politics." T. Vol. IV, 242.

One thing that particularly distorts appellees' analysis is its focus on the last act in the redistricting process to the exclusion of all that went before. Thus, if 99 of the 100 discrete decisions made during the course of adopting a redistricting plan were unrelated to race, appellees would still argue that the plan was solely or predominantly the product of race if the 100th decision -- *e.g.*, the decision to redraw a district line to comply with a Section 5 objection or to avoid fragmenting a concentration of minority population -- were made on the basis of race. In determining the influence of race, the 1992 plan cannot be divorced from the process from which it evolved, a process that "contended with numerous factors racial, political, economic, and personal." J.S. App. 26.

Appellees also claim that "if one fact pervades this case it is that the 1992 redistricting plan does not remotely resemble what the Georgia legislature wanted." Brief of Appellees at 2. Beyond ignoring that the legislature did enact the plan and voted not to file a preclearance suit, the claim totally ignores the fact that the plan was strongly endorsed by members of the black legislative caucus. Appellees, however, in a shocking display of racial arrogance, either do not believe that blacks are real members of the legislature or that the views of blacks are entitled to any recognition at all.

In addition, appellees ignore the fact that many white members of the legislature also endorsed the 1992 plan, Republicans as well as some Democrats. Murphy, T. Vol. II, 67-68. Even the lieutenant governor, who did not support the final plan, "was willing to try to do the right thing about creating three districts." Howard, T. Vol. IV, 205. The 1992 plan did not please everyone, but it was truly the product of the "pull, haul, and trade to find common political ground" that is the essence of the legislative process. *Johnson v. De Grandy*, 114 S. Ct. 2647, 2661 (1994).

APPENDIX A:

AFRICAN-AMERICANS IN THE U.S. CONGRESS, 1870-1995

United States Senate

Member	Party-State	Years
Hiram R. Revels	R-MS	1870-71
Blanche K. Bruce	R-MS	1875-81
Edward W. Brooke	R-MA	1967-79
Carol Moseley-Braun	D-IL	1993-

United States House of Representatives

Joseph H. Rainey	R-SC	1870-79
Jefferson F. Long	R-GA	1870-71
Robert B. Elliot	R-SC	1871-74
Robert C. De Large	R-SC	1871-73
Benjamin S. Turner	R-AL	1871-73
Josiah T. Walls	R-FL	1871-73
Richard H. Cain	R-SC	1873-75
		1877-79
John R. Lynch	R-MS	1873-77
		1882-83
James T. Rapier	R-AL	1873-75
Alonzo J. Ransier	R-SC	1873-75
Jeremiah Haralson	R-AL	1875-77
John A. Hyman	R-NC	1875-77
Charles E. Nash	R-LA	1875-77
Robert Smalls	R-SC	1975-79
James E. O'Hara	R-NC	1883-87
Henry P. Cheatham	R-NC	1889-93
John M. Langston	R-VA	1890-91

Member	Party-State	Years
Thomas E. Miller	R-SC	1890-91
George W. Murray	R-SC	1893-95
		1896-97
George W. White	R-NC	1897-1901
Oscar DePriest	R-IL	1929-35
Arthur W. Mitchell	D-IL	1935-43
William L. Dawson	D-IL	1943-70
Adam C. Powell, Jr.	D-NY	1945-67
		1969-71
Charles C. Diggs, Jr.	D-MI	1955-80
Robert N.C. Nix	D-PA	1958-78
Augustus F. Hawkins	D-CA	1963-90
John Conyers, Jr.	D-MI	1965-
William L. Clay	D-MO	1969-
Louis Stokes	D-OH	1969-
Shirley A. Chisholm	D-NY	1969-82
George W. Collins	D-IL	1970-72
Ronald V. Dellums	D-CA	1971-
Ralph H. Metcalfe	D-IL	1971-78
Parren H. Mitchell	D-MD	1971-86
Charles B. Rangel	D-NY	1971-
Walter E. Fauntroy	D-D.C.	1971-90
Yvonne B. Burke	D-CA	1973-79
Cardiss Collins	D-IL	1973-
Barbara C. Jordan	D-TX	1973-78
Andrew J. Young	D-GA	1973-77
Harold E. Ford	D-TN	1975-
Bennett M. Steward	D-IL	1979-80
Julian C. Dixon	D-CA	1979-
William H. Gray	D-PA	1979-91
Mickey Leland	D-TX	1979-89
Melvin Evans	R-V.I.	1979-80
George W. Crockett, Jr.	D-MI	1980-90
Mervyn M. Dymally	D-CA	1981-92

Member	Party-State	Years
Gus Savage	D-IL	1981-92
Harold Washington	D-IL	1981-83
Katie B. Hall	D-IN	1982-84
Major R. Owens	D-NY	1983-
Edolphus Towns	D-NY	1983-
Alan Wheat	D-MO	1983-94
Charles A. Hayes	D-IL	1983-92
Alton R. Waldon, Jr.	D-NY	1986-87
Mike Espy	D-MS	1987-93
Floyd H. Flake	D-NY	1987-
John Lewis	D-GA	1987-
Kweisi Mfume	D-MD	1987-
Donald M. Payne	D-NJ	1989-
Craig A. Washington	D-TX	1989-84
Barbara R. Collins	D-MI	1991-
Gary A. Franks	R-CT	1991-
William J. Jefferson	D-LA	1991-
Eleanor H. Norton	D-D.C.	1991-
Maxine Waters	D-CA	1991-
Lucien E. Blackwell	D-PA	1991-94
Sanford Bishop	D-GA	1993-
Corrine Brown	D-FL	1993-
Eva M. Clayton	D-NC	1993-
James E. Clyburn	D-SC	1993-
Cleo Fields	D-LA	1993-
Alcee L. Hastings	D-FL	1993-
Earl F. Hillard	D-AL	1993-
Eddie B. Johnson	D-TX	1993-
Cynthia McKinney	D-GA	1993-
Carrie Meek	D-FL	1993-
Mel Reynolds	D-IL	1993-
Bobby L. Rush	D-IL	1993-
Robert C. Scott	D-VA	1993-
Walter R. Tucker, III	D-CA	1993-

Member	Party-State	Years
Melvin Watt	D-NC	1993-
Albert R. Wynn	D-MD	1993-
Bennie G. Thompson	D-MS	1993-
Sheila Jackson Lee	D-TX	1995-
Chaka Fattah	D-PA	1995-
Victor O. Frazer	I-V.I.	1995-
J.C. Watts	R-OK	1995-